IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Honorable Michael J. Kelly Presiding

G.C. TIMMIS & COMPANY,

Plaintiff/Appellant, Docket No. 120035

v

GUARDIAN ALARM COMPANY,

Defendant/Appellee.
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BRIEF OF AMICUS CURIAE
MICHIGAN ASSOCIATION OF REALTORS®

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JURISDICTIONAL SUMMARY

This Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2), having granted Plaintiff/Appellant, G.C. Timmis & Company's Application for Leave to Appeal on July 2, 2002. This appeal involves review of a Court of Appeals' decision rendered on August 24, 2001.

COUNTER-STATEMENT OF QUESTION INVOLVED

I. IS AN INVESTMENT BANKING FIRM THAT DOES NOT POSSESS A REAL ESTATE BROKER'S LICENSE AND WHICH ENGAGES IN NEGOTIATIONS FOR THE PURCHASE OF A BUSINESS ON BEHALF OF ANOTHER PRECLUDED BY OPERATION OF MCL 339.2512a FROM RECOVERING COMPENSATION FOR ITS SERVICES?

Plaintiff/Appellant, G.C. Timmis Company answers "No";

Defendant/Appellee, Guardian Alarm Company answers "Yes";

The Circuit Court would answer "No";

The Court of Appeals answered "Yes";

Amicus Curiae, the Michigan Association of REALTORS®, answers "Yes".

I. STATEMENT OF INTEREST

The Michigan Association of REALTORS® (the "Association") is Michigan's largest non-profit trade association, comprised of 48 local boards and a membership of more than 26,000 brokers and salespersons licensed under Michigan law. A basic objective of the Association is to establish and maintain a high degree of ethical practice by and amongst its members through compliance with the licensure requirements of the Occupational Code (the "Code"), compliance with the strict Code of Ethics of the National Association of REALTORS®, and through adherence to standards of practice established to ensure understanding and compliance with the Code of Ethics. The Association, through imposition of continuing education requirements, provides training and expertise to local, state and national real estate professionals.

In view of its interest in compliance with the licensure requirements of the Code, the Association has a significant interest in any court decision that might affect the scope of licensure and regulation under the Code. The present case is such a case, as it involves the issue whether a corporation that negotiates the purchase of a business on behalf of another – while providing what it claims are investment banking services – must possess a real estate broker's license or be barred from recovering compensation for its services.

In Grand Rapids v Consumers Power Co, 216 Mich 409, 415; 185 NW 852 (1921), this Court stated: "[t]his Court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief Amicus Curiae. . ." The Association believes that this case involves an issue of fundamental importance to the Association and its members. The

Association's experience and expertise may be beneficial to this Court in resolving the substantive issue presented by this appeal. Accordingly, the Association submits this Brief Amicus Curiae in support of the position of Defendant/Appellee.

II. COUNTER-STATEMENT OF FACTS

A. Background

This case involves a business transaction whereby Defendant/Appellee, Guardian Alarm Company ("Guardian") purchased the assets of MetroCell Security ("MetroCell") from the Rao Corporation. Plaintiff/Appellant, G.C. Timmis & Company ("Timmis") is an investment banking firm that alleges it had an oral agreement with Guardian to provide investment banking services. Timmis further claims that those investment banking services ultimately resulted in Guardian's purchase of MetroCell. According to Timmis' Brief filed with this Honorable Court:

> . . . Plaintiff, G.C. Timmis & Company, is a sophisticated Investment Banking Firm, with a specialty in Mergers and Acquisitions. The Plaintiff has extensive experience and contacts in the home security industry, having previously provided advise [sic] and consultation to other members of the industry. The Plaintiff provided similar investment banking advice and consultation to the Defendant, Guardian Alarm Company, with regard to its position in the market and strategy for the future. As a direct result of the aforementioned investment banking services, the Defendant developed a strategy which included the acquisition of a competitor, Metrocell Security. Despite the successful relationship between the Plaintiff and the Defendant, the Defendant has refused to pay the agreed upon fee for investment banking services.

See, Timmis' Brief on Appeal (Timmis' "Brief"), pp 1-2.

Were this the entire story, the issue presently before this Court likely would not have arisen. However, the facts indicate that Timmis' conduct extended far beyond the realm of

providing Guardian with investment banking and/or strategic business planning services. Instead, the facts relied on by Timmis disclose that Timmis engaged in actual negotiations relative to Guardian's purchase of MetroCell.

Specifically, Timmis has included within its Appendix a portion of the deposition testimony of MetroCell's President, Mr. Duane Rao ("Rao"). According to Rao, Timmis contacted MetroCell on Guardian's behalf and had discussions with MetroCell regarding the potential sale of MetroCell to Guardian:

> Q. Prior to your first meeting with Rick Pierce you mentioned that you had some discussions with - - you said with Gerry, I assume you mean Gerry Timmis?
>
> A. Gerry Timmis.
>
> Q. Prior to your discussions with Gerry Timmis, had you any discussions with anybody about selling to Guardian Alarm?
>
> A. No.
>
> Q. The first time then that it was ever discussed between you and anybody was with Mr. Timmis?
>
> A. First time there was ever a real discussion about selling our company to Guardian Alarm absolutely was with Gerry Timmis at Merrill 220.

See, Rao Dep Tran, p 15, Timmis' Appendix, p 62a.

Similarly, Guardian's President, Milton Pierce, testified to the following:

> Q. Okay. When you asked Mr. Timmis to contact Mr. Rao, you asked him to contact Mr. Rao on your behalf, correct? On behalf of Guardian Alarm, correct?
>
> A. Yeah.

Q. Okay. At the time that Mr. Timmis was asked to contact Metro Cell Security, did you indicate to him the price that you'd be willing to pay for Metro Cell Security?

A. I don't think there was any price involved.

Q. Nevertheless, you were interested in purchasing Metro Cell Security at that time?

A. Yes.

Q. And you asked Mr. Timmis to contact Mr. Rao, correct?

A. Right.

See, Pierce Dep Tran, p 66, Timmis' Appendix, p 65a.

In addition to the above testimony, Timmis relies on the affidavit of its principal, Mr. Gerald C. Timmis III. See, Timmis' Appendix, pp 34a-40a. In relevant part, that affidavit further establishes that Timmis actively conducted negotiations relative to Guardian's attempt to acquire MetroCell:

26. The agreement between G.C. Timmis & Company and Guardian Alarm Company specified that a success fee would be paid on any target that I contacted on Guardian's behalf that was eventually acquired;

* * * * *

30. Through my extensive dealings with MetroCell Security, I was familiar with their product line, as well as their position in the market, both of which would be advantageous to my client, Guardian Alarm Company;

31. During this time period, there were extensive telephone discussions with the client regarding the nature of the industry, strategy, pricing, marketing and the implications of any such acquisition;

32. Although there were extensive negotiations between Guardian Alarm and MetroCell Security, the two parties were not able to agree on a purchase price, at which time I instructed Mr. Pierce to "let things percolate" and allow sufficient time to determine whether an agreement could be reached;

* * * * *

34. Despite my efforts, Guardian Alarm Company has refused my demand for payment of the $100,000 success fee due upon the closing of the transaction;

35. Guardian Alarm Company apparently now takes the position that on a prior occasion, Mr. Richard Pierce, Secretary for Guardian Alarm Company, had made contact with Metrocell Security regarding possible acquisition, prior to my involvement;

36. It is clear that any effort by Guardian Alarm Company to acquire Metrocell Security was unsuccessful prior to my involvement and prior to my provision of investment banking services to Guardian Alarm Company.

See, Timmis' Appendix, 38a-39a (emphasis added).

It is undisputed in this case that Guardian ultimately purchased MetroCell's assets for $1.4 Million. As compensation for its purported efforts, Timmis claims that Guardian owes it a minimum of $100,000 under an alleged oral agreement to pay Timmis a "success fee." When Guardian refused to pay, Timmis' attorney sent Guardian a demand letter that stated in relevant part:

> Based upon your agreement with Timmis on behalf of Guardian, Timmis, in good faith, represented Guardian in negotiations with The Rao Corporation for the purchase of MetroCell Security over a period of several weeks, during which Mr. Gerald Timmis spoke with you regarding specifics such as pricing, strategy and status. At all times following Guardian's agreement to retain Timmis in connection with the purchase of MetroCell, Mr. Timmis

> represented himself and performed as Guardian's agent with specifically granted authority and without any objection from Guardian. Under such circumstances, the contractual entitlement to this agreed upon fee in favor of Timmis is unquestionable.

See, Timmis' Appendix, pp 78a-79a (emphasis added).

B. The Litigation

The dispute between Timmis and Guardian over payment of the alleged "success fee" ultimately ripened into the present litigation. In defense of Timmis' claim for compensation, Guardian argued that Timmis' conduct fell within the definition of a "real estate broker" under MCL 339.2051(d), and that absent the possession of a real estate brokers' license, Timmis' claim for compensation was barred by operation of MCL 339.2512a:

> A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract. [MCL 339.2512a (emphasis added).]

Following a hearing held March 25, 1998, the Circuit Court denied Guardian's Motion for Summary Disposition, essentially finding a lack of documentary evidence to support the conclusion that Timmis' conduct fell exclusively within the purview of MCL 339.2051(d). See, Timmis' Appendix, pp 14a-16a, March 25, 1998 transcript, pp 11-13. The Court of Appeals subsequently granted leave to appeal, and in a published decision issued August 24, 2001, a majority of the Court of Appeals panel reversed the decision of the Circuit Court. The Court of Appeals majority held that Timmis' conduct constituted "negotiat[ions] [for] the purchase or sale or exchange of a business" within the meaning of MCL 339.2501(d), thus requiring that Timmis

possess a real estate broker's license in order to bring an action for compensation. G.C. Timmis & Co v Guardian Alarm Co, 247 Mich App 247; 635 NW2d 370 (2001); Timmis' Appendix, pp 23a-32a. Applying its previous decision in Cardillo v Canusa Extrusion Engineering, Inc, 145 Mich App 361; 377 NW2d 412 (1985), the Court of Appeals majority explained:

> Applying the principles of *Cardillo* to the instant case, we are satisfied that plaintiff's efforts to secure the sale of MetroCell's security monitoring agreements came squarely within the statute. *Cardillo, supra.* Indeed, plaintiff acknowledged, in a letter sent by plaintiff's attorney to defendant, that Timmis "represented [defendant] in negotiations with the Rao Corporation for the purchase of MetroCell Security over a period of several weeks." Additionally, plaintiff's brochure states that it often engages in transactions requiring it to perform acquisition negotiations. Moreover, the typical roles of investment bankers versus business brokers referred to by the trial court is irrelevant; rather, the appropriate inquiry is on the activities performed by a party and the character of the property involved in a particular case. *Cardillo, supra.* Here, plaintiff found business assets for defendant to purchase, conduct which falls squarely within the definition of activities performed by a "real estate broker" under the act. Notwithstanding plaintiff's assertions that its conduct consisted of "investment banking services" rather than "real estate broker services," it is clear that plaintiff's conduct in attempting to locate business assets for purchase by defendant constitutes action of a "real estate broker" as defined by statute.

G.C. Timmis & Co, supra, 247 Mich App at 256-257.

Significantly, the Court of Appeals majority not only found its prior decision in Cardillo persuasive, but it also found summary disposition warranted in light of the plain language of the statutes involved. In this regard, the Court of Appeals explained:

> As defendant notes, the statute defines activities, not occupations, requiring licensing. Under the plain language of the statute, a person of any occupation, including investment banking, involved

> in negotiating for a purchase of a business, business opportunity, or goodwill of a business, must obtain a license. MCL 339.2501(d); MSA 18.425(2501)(d); MCL 339.2512a; MSA 18.425(2512a). Further, the Legislature's exemption of certain professions from the licensing requirements of the statute to the exclusion of other professions, see MCL 339.2503; MSA 18.425(2503), indicates quite plainly that investment bankers, as a profession, were not intended to be exempt from the licensing requirements when they engage in activities covered by the act.

Id at 258 (emphasis added) (case citations omitted).

Following the Court of Appeals' decision, Timmis sought leave to appeal with this Honorable Court. In an Order entered July 2, 2002, this Court granted Timmis' Application, and invited interested persons or groups such as the Association to file briefs amicus curiae. See, Timmis' Appendix, p 33a. The Association now submits the instant Brief Amicus Curiae in support of affirming the result reached by the Court of Appeals.

III. ARGUMENT AND LAW

A. Standard of Review

Whether Timmis is precluded from recovering its success fee by operation of MCL 339.2512a raises an issue of statutory construction that was resolved in the context of a motion for summary disposition. As such, this matter is subject to *de novo* review by this Court. Terrien v Zwit, 467 Mich 56, 61; 648 NW2d 602 (2002); Huggett v Dep't of Natural Resources, 464 Mich 711, 717; 629 NW2d 915 (2001).

B. The Court Of Appeals Correctly Held That No Genuine Issue Of Material Fact Exists Regarding Whether Timmis Was Precluded By Operation Of MCL 339.2512a From Recovering Its Alleged Success Fee From Guardian

The issue presented by this appeal involves analysis of two specific statutory provisions. In construing those statutory provisions, this Court applies the plain and ordinary meaning of the language used. Cox v Board of Hospital Managers for the City of Flint, 467 Mich 1; __ NW2d __ (2002).

1. Timmis' Activities Qualified As Those Of A Real Estate Broker

The first statute to be analyzed governs whether Timmis' conduct constitutes the activities of a "real estate broker." In this regard, MCL 339.2501(d) provides, in relevant part:

> "Real estate broker" means an individual, sole proprietorship, partnership, association, corporation, common law trust, or a combination of those entities who with intent to collect or receive a fee, compensation, or valuable consideration. . .sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the goodwill of an existing business for others. . . (Emphasis added.)

Obviously, for purposes of this case, the critical term in the above statute is "negotiates." Because the term "negotiate" is not defined in the Code, this Court will look to dictionary definitions to determine its plain and ordinary meaning. Cox, supra; Stokes v Millen Roofing Co, 466 Mich 660, 665-666; 649 NW2d 371 (2002). In relevant part, Webster's Ninth New Collegiate Dictionary (1989) defines "negotiate" as:

> To carry on business. . .to confer with another so as to arrive at the settlement of some matter. . .to arrange for or bring about through conference, discussion, and compromise. . . (emphasis added)

Similarly, Black's Law Dictionary (5th ed.), contains, in relevant part, the following definition of "negotiate":

> To transact business; to bargain with another respecting a purchase and sale; to conduct communications or conferences with a view to reaching a settlement or agreement. It is that which passes between parties or their agents in the course of or incident to the making of a contract and is also conversation in arranging terms of contract.
>
> * * * * *
>
> To discuss or arrange a sale or bargain; to arrange the preliminaries of a business transaction.

Finally, the most recent edition of Black's Law Dictionary (7th ed.) defines "negotiate," in relevant part, as:

> To communicate with another party for the purpose of reaching an understanding. . . .To bring about by discussion or bargaining. . . .[1]

The Association submits that, based on the plain and ordinary meaning of the term "negotiate" as defined above, there can be no question that Timmis "negotiated" on behalf of Guardian when it attempted to arrange Guardian's purchase of MetroCell. The Affidavit of Gerald C. Timmis III, along with the deposition testimony of both Duane Rao and Milton Pierce, establish that Timmis conducted "communications" and "conferences" with both MetroCell and Guardian, communications that were designed with "a view toward reaching a settlement or agreement" relative to Guardian's purchase of MetroCell. Put another way, Timmis was involved in "arranging the preliminaries" or "attempting to bring about through conference and

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[1] For the Court's convenience, copies of these dictionary definitions are attached as an Addendum at the conclusion of this Brief.

discussion" Guardian's purchase of MetroCell.[2] Accordingly, because Timmis was conducting "negotiations," no genuine issue of material fact exists with respect to whether Timmis' conduct amounts to that of a "real estate broker" under Michigan law. Clearly, it does.

2. Timmis Is Barred As A Matter Of Law From Recovering Its Alleged Success Fee

Given that Timmis was performing the activities of a "real estate broker," the only remaining question is whether MCL 339.2512a bars Timmis from collecting its fee. Once again, MCL 339.2512a provides:

> A person engaged in the business of, or acting in the capacity of, a person required to be licensed under this article, shall not maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article at the time of the performance of the act or contract. [MCL 339.2512a (emphasis added).]

In arguing that its claim for compensation is not barred by MCL 339.2512a, Timmis maintains that it was performing the services of an investment banker. As discussed

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[2] Timmis' role in the transaction is perhaps best summarized in the February 26, 1997 demand letter from Timmis' attorneys to Guardian. See, Timmis' Appendix, pp 78a-79a. With regard to the effect of this letter, Timmis maintains that its contents are inadmissible pursuant to the provisions of MRE 408. Accordingly, Timmis has evidently filed a Motion in Limine in the Circuit Court seeking to exclude the letter from evidence. See, Timmis' Appendix, pp 70a-79a. The Association submits that even without referring to the statements in the demand letter, the remainder of the documentary evidence in the form of the deposition testimony and the Affidavit of Gerald C. Timmis III nonetheless discloses that Timmis was engaged in negotiations. With regard to the deposition transcripts and the aforementioned Affidavit (an executed copy of which was apparently filed with the Circuit Court after the hearing on the Motion for Summary Disposition), the Association notes that this Court has the power to add these materials to the record should this Court determine that they were technically not part of the record below. See, MCR 7.316(A)(4); see also, MCR 7.316(A)(7).

above, however, this is not in fact the case given the plain language of MCL 339.2501(d). The fact that Timmis engaged in negotiations on behalf of Guardian for the purchase of MetroCell compels the conclusion that Timmis engaged in conduct that required it to have a real estate broker's license.

In arguing to the contrary, Timmis attempts to compare its business activities to what it contends are the typical activities of modern-day commercial real estate brokers. See, Timmis' Brief, pp 14-15. However, Timmis' comparison is inaccurate in several important respects. First, Timmis' claim that a business broker "generally represents a seller who wants to list a business with the broker," while an investment banker "represents either sellers or buyers," is incorrect. Contrary to Timmis' assertions, commercial real estate brokers in Michigan have represented both buyers and sellers for at least 25 years. Residential real estate brokers have engaged extensively in the representation of buyers and sellers since 1994. Second, Timmis' claim that business brokers typically represent "small, family-owned businesses like bars and grills," whereas "the client base of investment bankers tends to be much broader" is also incorrect. See, Timmis Brief, p 15. Large commercial brokerage firms such as Cushman & Wakefield and Grubb & Ellis frequently engage in large scale transactions involving businesses and properties the size of which far exceed that of a small family owned business or the transaction at issue in this case.[3]

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[3] In this regard, the Court's attention is directed to Cushman & Wakefield's website, in particular the various "case studies" appearing at http://www.cushmanwakefield.com/us/. As summarized in those various case studies, Cushman and Wakefield has represented such clients as Boeing, Lucent Technologies and International Paper.

In any event, as the Court of Appeals correctly held, the typical roles of investment bankers versus business brokers relied on by Timmis is irrelevant. Put another way, the fact that Timmis may have performed other "non-negotiation" services typically performed by investment bankers is irrelevant for purposes of determining whether MCL 339.2512a bars Timmis' claim for compensation. As to this issue, this Court's recent decision in Stokes, supra, is controlling.

At issue in Stokes was whether an unlicensed roofing contractor could enforce a construction lien and/or recover compensation for a slate roof it had installed on the plaintiffs' home. Employing language virtually identical to MCL 339.2512a, the Michigan Residential Builders Act provides:

> A person or qualifying officer for a corporation or member of a residential builder or residential maintenance and alteration contractor shall not bring or maintain an action in a court of this state for the collection of compensation for the performance of an act or contract for which a license is required by this article without alleging and proving that the person was licensed under this article during the performance of the act or contract. [MCL 339.2412 (emphasis added).]

Attempting to salvage at least part of its claim, the contractor in Stokes argued that it was not barred from recovering the value of materials it supplied because it was not required to be licensed to "supply" materials. This Court rejected that argument, ruling as a matter of law that the supply of materials could not be "bifurcated" from the remainder of the parties' agreement. Stokes, supra, 466 Mich at 666-667. More importantly, however, this Court held that even if the parties' agreement could be "bifurcated," MCL 339.2412 would still bar the roofer's claim. In relevant part, this Court held:

> Even if, normally, the contract could be bifurcated, the statute prohibits it. Section 2412 bars a suit for compensation if a license was necessary for performance of "an act or contract." The statute requires us to look for either an act or a contract requiring a license. It does not make provision for bifurcating building contracts into separate labor and supply components. Accordingly, it is irrelevant that Millen could have supplied slate without a license. Millen's counterclaim was properly disallowed.

[Id at 667 (emphasis added, footnote omitted).]

Thus, as a matter of law, Timmis cannot recover on its claim for compensation. Under this Court's holding in Stokes, the language employed by the legislature in MCL 339.2512a precludes bifurcating the alleged contract between Timmis and Guardian. As a result, it is completely irrelevant that Timmis could have performed some of its services as an investment banker without a real estate broker's license. Because Timmis' was indisputably engaged in acts of negotiation that required it to be licensed as a real estate broker, Timmis' claim for compensation is barred in its entirety.

3. Timmis' Out-Of-State Cases Are Inapposite

At pages 21 through 25 of its Brief, Timmis relies on several out-of-state cases which it claims justify allowing it to recover compensation in the form of a "finder's fee". The Association submits that these cases are of no help to Timmis in view of the plain language of MCL 339.2501(d), and the documentary evidence establishing that Timmis engaged in "negotiations" relative to Guardian's purchase of MetroCell.

For example, Timmis relies on the Court's decision in Eaton Associates v Highland Broadcast Corp, 81 AD2d 603; 437 NYS 2d 715 (1981). In that case, the plaintiff had been hired by the owner of some radio stations to prepare and market a refinancing package to

assist the defendant in raising new capital. Id. The plaintiff's efforts resulted in the defendant successfully obtaining first and second mortgage financing from lending institutions. Id. In defense of the plaintiff's claim for compensation, the defendant argued that the plaintiff was required to possess a real estate broker's license under New York law because its conduct involved negotiation of "a loan secured or to be secured by a mortgage or other encumbrance upon real estate." Id. Rejecting this argument and affirming the judgment of the circuit court, the appellate division of the New York Supreme Court observed:

> . . .Eaton's services, including the preparation of a financial plan and the rendering of financial advice to Highland's employees and officers, fall outside the scope of real estate brokerage services. The mortgages were an incidental feature of Eaton's responsibilities, and thus the licensing requirement of section 440-a of the Real Property Law is inapplicable to such services. The purposes of the real estate broker's licensing regulations, i.e., to protect dealers from unlicensed persons acting as brokers and to protect the public from inept, inexperienced persons, would not be furthered by requiring compliance from a so-called "financial consultant". Additionally, since the failure to procure a license is a crime, article 12-A of the Real Property Law should be strictly construed so as not to encompass every situation in which an interest in real estate may be part of the transaction. Since Eaton was not acting as a "broker" within the intent of article 12-A of the Real Property Law, its right to compensation is not defeated by said statute.

Eaton Associates, 81 AD2d at 604 (emphasis added) (citations omitted).

The decision in Eaton Associates is directly contrary to Michigan law established by this Court's recent decision in Stokes, supra. Simply stated, under Stokes, there is no allowance for "bifurcation" of the services performed by viewing some of the services as "incidental." Instead, MCL 339.2512a requires only the commission of an "act" requiring a license in order for compensation to be barred. Stokes, supra, 466 Mich at 667. More important,

with regard to the issue of Timmis' having engaged in negotiations, the court in Eaton Associates explained:

> Although Eaton did not play a role in formulating the actual terms of either agreement, "A broker 'negotiates' just as much as when he brings parties together in such frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision."

Eaton Associates, 81 AD2d at 603-604 (emphasis added, citations omitted).[4]

The point is further illustrated by the more recent New York decision in Berg v Wilpon, 180 Misc 2d 956; 692 NYS 2d 600 (1999), aff'd 271 AD2d 629 (2000). In Berg, the plaintiff brought suit for compensation stemming from its allegedly having negotiated a commercial lease between the defendant landlord and a large pharmacy chain. Id. At trial, the plaintiff argued that his services were those of a "finder" or "originator," and that a line of New York cases (including Eaton Associates) permitted his recovery without a real estate license. Id at 957. Recognizing that New York law allowed recovery without a license under certain circumstances even where real estate was an "incidental element" of the transaction, the court in Berg nevertheless dismissed the plaintiff's complaint, and in so doing explained:

> There remains a final question: where real estate is a dominant feature of a transaction is there nevertheless a level of services so minimal that statute would not bar recovery? The question is addressed by the Second Department in a reverse context, i.e., the extent of services a licensed broker must provide in order to earn a commission.

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[4] Indeed, as this Court observed nearly 100 years ago, procuring a purchaser for another's property is the "very essence" of brokerage services. Smith v Starke, 196 Mich 311, 314; 162 NW 999 (1917).

> 'The essential feature of a broker's employment is to bring the parties together in an amicable frame of mind, with an attitude toward each other and toward the transaction in hand which permits their working out the terms of their agreement. They may reach that agreement without his aid or interference. A broker 'negotiates' just as much when he brings parties together in such a frame of mind that they can by themselves evolve a plan of procedure, as when he himself carries on the discussion and personally induces an agreement to accept a specific provision."
>
> *Salzano v. Pellillo*, 4 A.D.2d 789, 790, 165 N.Y.S.2d 500 (2d Dept.1957), citing *Baird supra. See also, Eaton Associates v. Highland Broadcasting Corp.*, 81 A.D.2d 603, 437 N.Y.S.2d 715 (2d Dept.1981).
>
> The Court has thus established a boundary dividing the services of a broker and of a finder since it is clear that a level of services sufficient to earn a commission for a licensed broker cannot at the same time be so minimal as to support the claim of a purported finder that he has not engaged in brokerage services.
>
> While there may exist a level of involvement less extensive than the boundary described in *Salzano* (e.g. as in [PW Chapman & Co, Inc v Cornelius, 39 F2d 255 (CA 2 1930)] for which the statute would not be a bar, it need not be addressed here. The evidence in this case, including Berg's own testimony, clearly establishes that his involvement significantly exceeded the boundary and constituted brokerage services.

Berg, 180 Misc 2d at 958-959 (emphasis added).[5]

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[5] In the PW Chapman case, referenced by the court in Berg as possibly illustrating a level of involvement less extensive than the boundary quoted in Berg, the plaintiff "merely provided financing information. . . but did nothing to bring together the seller and purchaser or the purchaser and mortgagee." Berg, supra, 180 Misc 2d at 958. In the present case, as discussed above, the documentary evidence clearly shows that Timmis' activities involved bringing Guardian and MetroCell together.

Of similar import is the decision in Zappas v King Williams Press, Inc, 10 Cal App 3d 768; 89 Can Rptr 307 (1970), a case also relied upon by Timmis. Summarizing the state of California law at the time, the court in Zappas explained:

> The decisions have drawn the line between "brokers" and "finders" on the basis of whether the person in question has engaged in any negotiating to consummate the transaction. Thus, in *Shaffer v. Beinhorn,* [190 Cal 569, 573-574; 213 P 960] after holding that the plaintiff's complaint stated a cause of action, the Supreme Court stated: 'It may be that upon a trial of the case the defendant may be able to prove that plaintiffs did in fact actually assist in negotiating the sale. If he can do this, it is a good defense.'

Zappas, supra, 10 Cal App 3d at 773.

Finally, Timmis relies on language from the Ohio Supreme Court's decision in Legros v Tarr, 44 Ohio St 3d 1; 540 NE2d 257 (1989), where that court drew a distinction between brokers and finders. A careful review of that decision reveals that it provides no support for Timmis' position.

At issue in Legros was a claim for compensation brought by Emil E. Legros, Jr. ("Legros"), a former Vice-President of an investment banking firm, Butcher & Singer, Inc. ("Butcher & Singer"). Butcher & Singer had a contract to identify potential acquisition candidates for its client, Union Metal Manufacturing Company ("Union Metal"). Id at 2.

Over the course of the contract, Legros provided Union Metal with the names of two companies that were potential candidates for acquisition. Id at 2-3. When Union Metal acquired neither company, its Vice-President, Michael E. Tarr ("Tarr"), participated in the formation of an Oklahoma corporation, Burning Hills Steel Company ("Burning Hills"), to which Tarr later disclosed the identities of the potential acquisition targets. Id at 3. After

Burning Hills acquired both targets, Legros filed suit to recover, among other things, compensation from both Burning Hills and Tarr. Id at 4. Butcher & Singer intervened in the lawsuit as a plaintiff, also seeking compensation. Id.

In ruling that Butcher & Singer could recover a finder's fee on a theory of quantum meruit, the Ohio Supreme Court began its analysis by drawing what it considered to be a legal distinction between "investment brokers" and "business opportunity finders." According to the Ohio Supreme Court:

> 'A business finder is one who finds, interests, introduces, and brings parties together for a transaction that they themselves negotiate and consummate. A finder is an intermediary or middleman who is not necessarily involved in negotiating any of the terms of the transaction.' Essentially, the business finder is selling confidential information he has developed himself. The identity of a potential acquisition candidate is the stock in trade of a finder or investment banking house.
>
> In contrast, a broker not only introduces the parties but also negotiates on behalf of one of the parties with the best interests of such party being his charge.
>
> * * * * *
>
> [A] review of the law of other jurisdictions demonstrates that an important difference exists in the circumstances under which finders and brokers may be compensated. In general, a broker retained to procure a buyer or seller of a business is entitled to a commission if he (1) produces a buyer or seller who is ready, willing and able to buy or sell on the principal's terms, and (2) the transaction, or the readiness to perform on the principal's terms, directly results from the broker's efforts, without a break in continuity. In essence, a broker earns his fee only if he was the 'procuring cause' of the transaction, even if the transaction is never actually finalized.
>
> On the other hand, in the absence of contractual terms to the contrary, a finder is entitled to a commission or fee only if his

> introduction results in a transaction, irrespective of whether a third person brings the parties to agreement. The causation, or "procuring cause," requirement is satisfied by the mere introduction, even if negotiations are abandoned and later successfully resumed, provided the renewed negotiations are connected to and stem from the original introduction.

Id at 5-6 (emphasis added, citations omitted).

Concluding that Butcher & Singer was properly considered a "finder" as opposed to a "broker," the court in Legros focused on the terms of the contract coupled with the evidence of Legros' activities. In this connection, the court observed that under the parties' agreement, payment was contingent solely on identification, and that Legros did not "actively negotiate" on behalf of Union Metal. Id at 5-7. In pertinent part, the court in Legros explained:

> In the instant case it is obvious, both from the contract between the parties and the actual activities of Legros, that Union Metal employed Butcher & Singer to act merely as a business finder, not a broker.
>
> * * * * *
>
> Although the contract between Butcher & Singer and Union Metal states that, in addition to locating acquisition prospects, Butcher & Singer will assist Union Metal "in negotiations *** as we both deem appropriate to completing the transaction," the payment of compensation was contingent solely on a completed acquisition or divestiture with a party identified by Butcher & Singer. This contract form, in addition to the evidence in the record that Legros did not actively negotiate on behalf of Union Metal with either Speedrack or Wisconsin Bridge, establishes appellants as mere finders with respect to these transactions.

Id at 5-7 (emphasis added).

The Association submits that the circumstances in Legros are readily distinguishable from the case at bar. By Timmis' own admission, payment of the alleged

"success fee" in the present case was expressly contingent on Timmis' contacting potential targets, not merely identifying them to Guardian. See, Timmis' Aff, ¶ 26; Timmis' Appendix, p 38a. Moreover, unlike the situation in Legros, the evidence in the instant case establishes that Timmis did in fact negotiate through its direct contact with MetroCell on Guardian's behalf. In short, unlike the situation in Legros, Timmis was not merely "selling confidential information it had developed itself." Legros, supra, 440 Ohio St 3d at 5. As the Ohio Supreme Court noted, it is this selling of identities that is the "stock in trade" of an investment banking house. Id. Consequently, Timmis' reliance on the decision in Legros is misplaced.

To summarize the Association's position, Timmis' activities in this particular case, whether related to providing investment banking services or not, clearly constitute negotiating within the meaning of MCL 339.2051(d). As a result, Timmis was required to possess a real estate broker's license in order to seek compensation. MCL 339.2512a. If all Timmis had done was provide Guardian with information relative to the identity of possible "targets," including MetroCell, the Association would have no quarrel with Timmis' right to sue for its fee. However, once Timmis "negotiated" by contacting and speaking with MetroCell on Guardian's behalf regarding a possible sale, its conduct surpassed the threshold of becoming brokerage activities for which a license is required under Michigan law. MCL 339.2051(d).[6] Accordingly, the Court of Appeals did not err in reversing the decision of the Circuit Court denying summary disposition to Guardian.

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[6] According to Timmis' own description of the transaction, Timmis did not set out to "find" MetroCell. Rather, MetroCell was a predetermined "target" which Timmis was asked by Guardian to contact on Guardian's behalf. See, Timmis' Affidavit, ¶ 29, Timmis' Appendix, p 38a; Deposition of Milton Pierce, Timmis' Appendix, p 65a.

4. Principles Of Statutory Construction Support The Result Reached By The Court Of Appeals In This Case

Finally, as the Court of Appeals correctly noted, the legislature has seen fit to expressly exempt certain conduct and professions from coverage under Article 25 of the Code. See, GC Timmis & Co, supra, 247 Mich App at 258, citing MCL 339.2503. Investment bankers are simply not included within the list of professionals the legislature chose to exempt. Over the years, the doctrine of *expressio est unius exclusio alterius* – that the express mention of one thing in a statute excludes others – has been well recognized in this Court's jurisprudence. See, e.g., Feld v Robert and Charles Beauty Salon, 435 Mich 352, 362; 459 NW2d 279 (1990); Newhall v Ace Steel and Fabricating Co, 352 Mich 528, 535-536; 90 NW2d 459 (1958); Malleis v Michigan Employment Security Comm'n, 340 Mich 78, 83; 64 NW2d 663 (1954). Here, the fact that the legislature has chosen to exclude other professionals from licensure renders the conclusion "inescapable" that the legislature chose not to extend the same exclusion to investment bankers. See, Bradley v Board of Education of the Saranal Community Schools, 455 Mich 285, 298-299; 565 NW2d 650 (1997). It is therefore not only unadvisable but simply beyond the power of this Court to add to the list of exempt professions through judicial pronouncement. Feld, supra, 435 Mich at 366. As a result, the decision of the Court of Appeals should be upheld.

IV. CONCLUSION AND RELIEF REQUESTED

For all the within stated reasons, the Association respectfully requests that this Honorable Court affirm the decision of the Court of Appeals. Timmis' conduct in negotiating Guardian's purchase of MetroCell's assets falls squarely within the plaint and ordinary meaning

of MCL 339.2501(d), requiring that Timmis be licensed as a real estate broker or be barred from bringing any claim for compensation. MCL 339.2512a.

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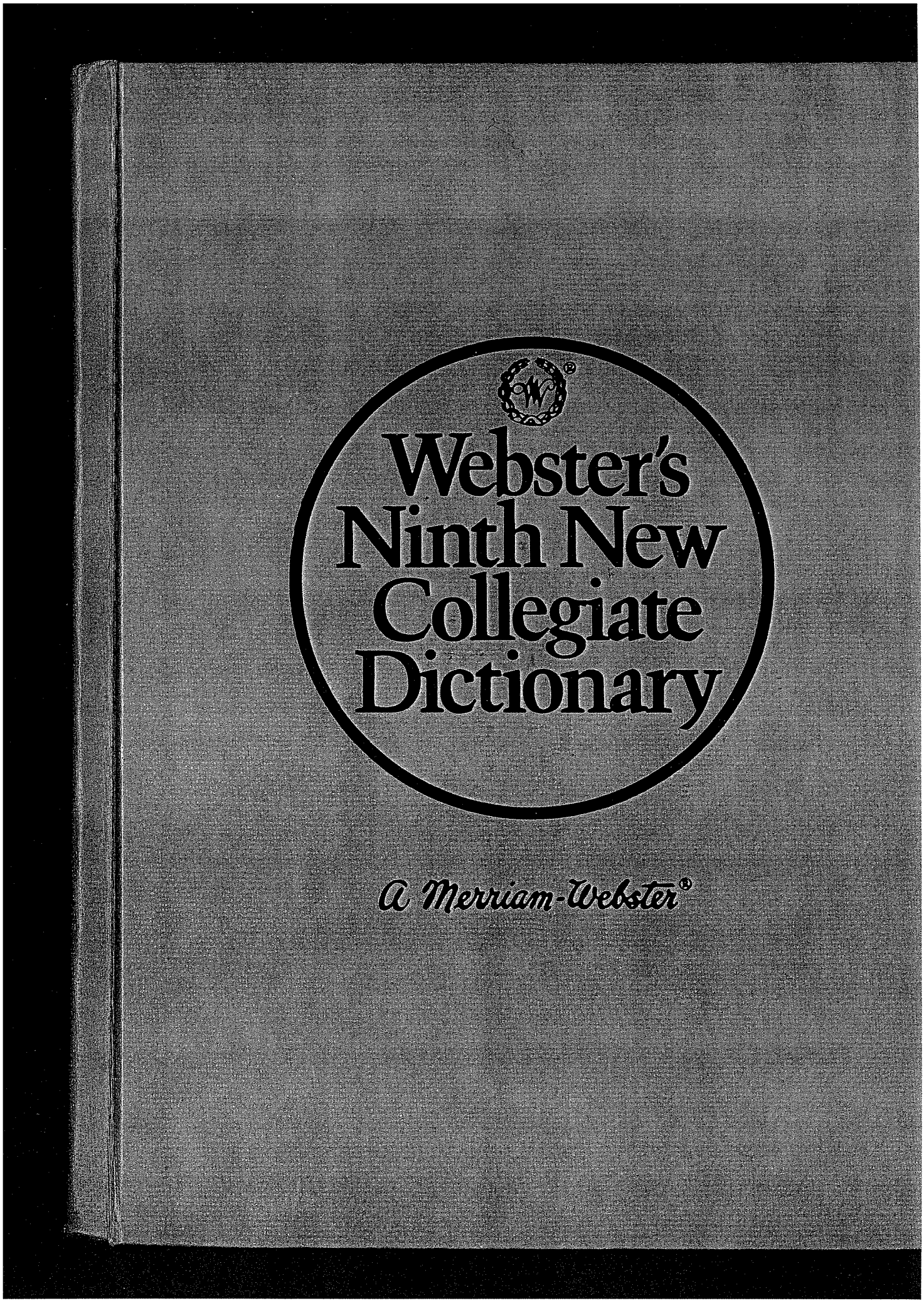
ADDENDUM

DICTIONARY DEFINITIONS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need *vt* (bef. 12c) **1** : to be in want **2** : to be needful or necessary ~ *vi* : to be in need of : REQUIRE ~ *verbal auxiliary* : be under necessity or obligation to ⟨you ~ not answer⟩

need-ful \'nēd-fəl\ *adj* (bef. 12c) **1** : being in need **2** : NECESSARY, REQUISITE — **need·ful·ly** \-fə-lē\ *adv* — **need·ful·ness** *n*

needful *n* (1709) **1** : something needed or requisite **2** : MONEY

nee·dle \'nēd-ᵊl\ *n* [ME *nedle*, fr. OE *nǣdl*; akin to OHG *nādala* needle, *nājan* to sew, L *nēre* to spin, Gk *nēn*] (bef. 12c) **1 a** : a small slender usu. steel instrument that has an eye for thread at one end and that is used for sewing **b** : any of various devices for carrying thread and making stitches (as in crocheting or knitting) **c** (1) : a needle designed to carry sutures when sewing tissues in surgery (2) : a slender hollow instrument for introducing material into or removing material from the body parenterally (3) : a hollow device designed to contain radioactive material **2** : a slender usu. sharp-pointed indicator on a dial; *esp* : MAGNETIC NEEDLE **3 a** : a slender pointed object resembling a needle: as (1) : a pointed crystal (2) : a sharp rock (3) OBELISK **b** : a needle-shaped leaf (as of a conifer) **c** : a slender piece of jewel, steel, wood, or fiber with a rounded tip used in a phonograph to transmit vibrations from the record : STYLUS **d** : a slender pointed rod controlling a fine inlet or outlet (as in a valve) **4** : a teasing or gibing remark — **nee·dle·like** \'nēd-ᵊl-ˌ(l)īk\ *adj*

needle *vb* **nee·dled; nee·dling** \'nēd-liŋ, -ᵊl-iŋ\ *vt* (1715) **1** : to sew or pierce with or as if with a needle **2 a** : TEASE, TORMENT **b** : to incite to action by repeated gibes ⟨*needled* the boy into a fight⟩ ~ *vi* : SEW, EMBROIDER — **nee·dler** \'nēd-lər, -ᵊl-ər\ *n*

needle fish \'nēd-ᵊl-ˌfish\ *n* (1601) **1** : any of a family (Belonidae) of voracious elongate green and silvery teleost fishes with long slender jaws **2** : PIPEFISH

needle point \-ˌpȯint\ *n* (ca. 1865) **1** : lace worked with a needle over a paper pattern **2** : embroidery done on canvas usu. in simple even stitches across counted threads — **needlepoint** *adj*

needless \'nēd-ləs\ *adj* (bef. 12c) : not needed : UNNECESSARY ⟨~ waste⟩ — **need·less·ly** *adv* — **need·less·ness** *n*

needle·woman \'nēd-ᵊl-ˌwu̇m-ən\ *n* (1611) : a woman who does needlework; *esp* : SEAMSTRESS

needle·work \-ˌwərk\ *n* (14c) **1** : work done with a needle; *esp* : work (as embroidery) other than plain sewing **2** : the occupation of one who does needlework — **nee·dle·work·er** \-ˌwər-kər\ *n*

needn't \'nēd-ᵊnt\ : need not

needs \'nēdz\ *adv* [ME *nedes*, fr. OE *nēdes*, fr. gen. of *nēd* need] (bef. 12c) : of necessity : NECESSARILY ⟨must ~ be recognized⟩

needy \'nēd-ē\ *adj* **need·i·er; -est** (14c) : being in want : POVERTY-STRICKEN ⟨~ families⟩ — **need·i·ness** *n*

neem \'nēm\ *n* [Hindi *nīm*, fr. Skt *nimba*] (1813) : a large East Indian tree (*Azadirachta indica*) whose trunk exudes a tenacious gum and has a bitter bark used as a tonic and whose fruit and seeds yield a medicinal aromatic oil — called also *neem tree*

ne'er \(ᵊ)ne(ə)r, (ᵊ)na(ə)r\ *adv* (13c) : NEVER

ne'er-do-well \'ne(ə)r-dü-ˌwel, 'na(ə)r-\ *n* (1736) : an idle worthless person — **ne'er-do-well** *adj*

ne·far·i·ous \ni-'far-ē-əs, -'fer-\ *adj* [L *nefarius*, fr. *nefas* crime, fr. *ne-* not + *fas* right, divine law; akin to L *fari* to speak — more at BAN] (ca. 1604) : flagrantly wicked or impious : EVIL *syn* see VICIOUS — **ne·far·i·ous·ly** *adv*

ne·gate \ni-'gāt\ *vt* **ne·gat·ed; ne·gat·ing** [L *negatus*, pp. of *negare* to say no, deny, fr. *neg-* no, not (akin to *ne-* not) — more at NO] (ca. 1623) **1** : to deny the existence or truth of **2** : to cause to be ineffective or invalid *syn* see NULLIFY — **negate** *n* — **ne·ga·tor** *or* **ne·gat·er** \-'gāt-ər\ *n*

ne·ga·tion \ni-'gā-shən\ *n* (15c) **1 a** : the action or logical operation of negating or making negative **b** : a negative statement, judgment, or doctrine; *esp* : a logical proposition formed by asserting the falsity of a given proposition **2 a** : something that is the absence of something actual : NONENTITY **b** : something considered the opposite of something regarded as positive — **ne·ga·tion·al** \-shnəl, -shən-ᵊl\ *adj*

neg·a·tive \'neg-ət-iv\ *adj* (15c) **1 a** : marked by denial, prohibition, or refusal (received a ~ answer); *also* : marked by absence, withholding, or removal of something positive ⟨the ~ motivation of shame — Garrett Hardin⟩ **b** (1) : denying a predicate of a subject or a part of a subject ("no A is B" is a ~ proposition⟩ (2) : denoting the absence or the contradictory of something ⟨*nontoxic* is a ~ term⟩ (3) : expressing negation ⟨~ particles such as *no* and *not*⟩ **c** : ADVERSE, UNFAVORABLE ⟨the reviews were mostly ~⟩ **2 a** : lacking positive qualities; *esp* : DISAGREEABLE **b** : marked by features (as hostility or withdrawal) opposing constructive treatment or development ⟨had a ~ outlook on life⟩ **3 a** (1) : less than zero and opposite in sign to a positive number that when added to the given number yields zero ⟨−2 is a ~ number⟩ (2) : having more outgo than income : constituting a loss ⟨~ cash flow⟩ ⟨~ worth⟩ **b** : extending or generated in a direction opposite to an arbitrarily chosen regular direction or position ⟨~ angle⟩ **4 a** : being, relating to, or charged with electricity of which the electron is the elementary unit **b** : gaining electrons **c** (1) : having lower electric potential and constituting the part toward which the current flows from the external circuit ⟨the ~ pole⟩ (2) : constituting an electrode through which a stream of electrons enters the space between electrodes in an electron tube **5 a** : not affirming the presence of the organism or condition in question ⟨a ~ TB test⟩ **b** : directed or moving away from a source of stimulation ⟨~ tropism⟩ **c** : less than the pressure of the atmosphere ⟨~ pressure⟩ **6** : having the light and dark parts in approximately inverse order to those of the original photographic subject **7** *of a lens* : diverging light rays and forming a virtual inverted image — **neg·a·tive·ly** *adv* — **neg·a·tive·ness** *n* — **neg·a·tiv·i·ty** \ˌneg-ə-'tiv-ət-ē\ *n*

negative *n* (1571) **1 a** : a proposition which denies or contradicts another; *esp* : the one of a pair of propositions in which negation is expressed **b** (1) : a reply that indicates the withholding of assent (2) *archaic* : a right of veto (3) *obs* : an adverse vote **2 a** : something that is the opposite or negation of something else **b** : a negative number **4** : the side that upholds the contradictory proposition in a debate **5** : the plate of a voltaic or electrolytic cell that is at the lower potential **6** : a negative photographic image on transparent material used for printing positive pictures; *also* : the material that carries such an image **7** : a reverse impression taken from a piece of sculpture or ceramics

negative *vt* **-tived; -tiv·ing** (1706) **1 a** : to refuse assent to **b** : to reject by or as if by a vote **2** : to demonstrate the falsity of **3** : to deny the truth, reality, or validity of **4** : NEUTRALIZE, COUNTERACT

negative feedback *n* (1934) : feedback that tends to stabilize a process by reducing its rate or output when its effects are too great

negative income tax *n* (1966) : a system of federal subsidy payments to families with incomes below a stipulated level

negative staining *n* (1944) : a method of demonstrating the form of small objects (as bacteria) by surrounding them with a stain that they do not take up so that they appear as sharply outlined unstained bright bodies on a colored ground

negative transfer *n* (1921) : the impeding of learning or performance in a situation by the carry-over of learned responses from another situation

neg·a·tiv·ism \'neg-ət-iv-ˌiz-əm\ *n* (1824) **1** : an attitude of mind marked by skepticism about nearly everything affirmed by others **2** : a tendency to refuse to do, to do the opposite of, or to do something at variance with what is asked — **neg·a·tiv·ist** \-əst\ *n or adj* — **neg·a·tiv·is·tic** \ˌneg-ət-iv-'is-tik\ *adj*

neg·a·tron \'neg-ə-ˌträn\ *also* **neg·a·ton** \-ˌtän\ *n* [*negatron*, fr. *negative* + *electron*; *negaton*, fr. *negative* + *-on*] (1934) : ELECTRON

¹ne·glect \ni-'glekt\ *vt* [L *neglectus*, pp. of *neglegere*, *neclegere*, fr. *nec-* not (akin to *ne-* not) + *legere* to gather — more at NO, LEGEND] (1529) **1** : to give little attention or respect to : DISREGARD **2** : to leave undone or unattended to esp. through carelessness — **ne·glect·er** *n*

syn NEGLECT, OMIT, DISREGARD, IGNORE, OVERLOOK, SLIGHT, FORGET mean to pass over without giving due attention. NEGLECT implies giving insufficient attention to something that has a claim to one's attention; OMIT implies absence of all attention; DISREGARD suggests voluntary inattention; IGNORE implies a failure to regard something obvious; OVERLOOK suggests disregarding or ignoring through haste or lack of care; SLIGHT implies contemptuous or disdainful disregarding or omitting; FORGET may suggest either a willful ignoring or a failure to impress something on one's mind.

²neglect *n* (1588) **1** : an act or instance of neglecting something **2** : the condition of being neglected

ne·glect·ful \ni-'glek(t)-fəl\ *adj* (1644) : given to neglecting : CARELESS, HEEDLESS *syn* see NEGLIGENT — **ne·glect·ful·ly** \-fə-lē\ *adv* — **ne·glect·ful·ness** *n*

neg·li·gee *also* **neg·li·gé** \ˌneg-lə-'zhā, 'neg-lə-ˌ\ *n* [F *négligé*, fr. pp. of *négliger* to neglect, fr. L *neglegere*] (1756) **1** : a woman's long flowing usu. sheer dressing gown **2** : carelessly informal or incomplete attire

neg·li·gence \'neg-li-jən(t)s\ *n* (14c) **1 a** : the quality or state of being negligent **b** : failure to exercise the care that a prudent person usu. exercises **2** : an act or instance of negligence

neg·li·gent \-jənt\ *adj* [ME, fr. MF & L; MF, fr. L *neglegent-*, *neglegens*, prp. of *neglegere*] (14c) **1** : marked by or given to neglect esp. habitually or culpably : not taking prudent care **2** : marked by a carelessly easy manner — **neg·li·gent·ly** *adv*

syn NEGLIGENT, NEGLECTFUL, LAX, SLACK, REMISS mean culpably careless or indicative of such carelessness. NEGLIGENT implies inattention to one's duty or business; NEGLECTFUL adds a more disapproving implication of laziness or deliberate inattention; LAX implies a blameworthy lack of strictness, severity, or precision; SLACK implies want of due or necessary diligence or care; REMISS implies blameworthy carelessness shown in slackness, forgetfulness, or neglect.

neg·li·gi·ble \'neg-li-jə-bəl\ *adj* [L *neglegere*, *negligere*] (1829) : so small or unimportant or of so little consequence as to warrant little or no attention : TRIFLING — **neg·li·gi·bil·i·ty** \ˌneg-li-jə-'bil-ət-ē\ *n* — **neg·li·gi·bly** \'neg-li-jə-blē\ *adv*

ne·go·tia·ble \ni-'gō-sh(ē-)ə-bəl\ *adj* (1758) : capable of being negotiated: as **a** : transferable from one person to another by being delivered with or without endorsement so that the title passes to the transferee ⟨~ securities⟩ **b** : capable of being traversed, dealt with, or accomplished ⟨a difficult but ~ road⟩ ⟨~ demands⟩ — **ne·go·tia·bil·i·ty** \-ˌgō-sh(ē-)ə-'bil-ət-ē\ *n*

ne·go·tiant \-'gō-sh(ē-)ənt\ *n* (1611) : one that negotiates

ne·go·ti·ate \ni-'gō-shē-ˌāt\ *vb* **-at·ed; -at·ing** [L *negotiatus*, pp. of *negotiari* to carry on business, fr. *negotium* business, fr. *neg-* not + *otium* leisure — more at NEGATE] *vi* (1599) : to confer with another so as to arrive at the settlement of some matter ~ *vt* **1 a** : to deal with (some matter or affair that requires ability for its successful handling) : MANAGE **b** : to arrange for or bring about through conference, discussion, and compromise ⟨~ a treaty⟩ **2 a** : to transfer (as a bill of exchange) to another by delivery or endorsement **b** : to convert into cash or the equivalent value ⟨~ a check⟩ **3 a** : to successfully travel along or over ⟨~ a turn⟩ **b** : COMPLETE, ACCOMPLISH ⟨~ the trip in two hours⟩ — **ne·go·ti·a·tor** \-ˌāt-ər\ *n* — **ne·go·tia·to·ry** \-sh(ē-)ə-ˌtōr-ē, -ˌtȯr-\ *adj*

ne·go·ti·a·tion \ni-ˌgō-s(h)ē-'ā-shən\ *n* (15c) : the action or process of negotiating or being negotiated — often used in pl.

Ne·gress \'nē-grəs\ *n* (1786) : a female Negro — sometimes taken to be offensive

Ne·gril·lo \ni-'gril-(ˌ)ō, -'grē-(ˌ)(y)ō\ *n, pl* **-los** *or* **-loes** [Sp, dim. of *negro*] (1853) : a member of a people (as Pygmies) belonging to a group of Negroid peoples of small stature that live in Africa

Ne·gri·to \nə-'grēt-(ˌ)ō\ *n; pl* **-tos** *or* **-toes** [Sp, dim. of *negro*] (1812) : a member of a people (as the Andamanese) belonging to a group of Negroid peoples of small stature that live in Oceania and the southeastern part of Asia

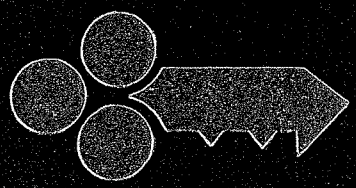
ne·gri·tude \'neg-rə-ˌtüd, 'nē-grə-, -ˌtyüd\ *n* [F *négritude*, fr. *nègre* Negro + *-i-* + *-tude*] (1950) : a consciousness of and pride in the cultural and physical aspects of the African heritage

Ne·gro \'nē-(ˌ)grō\ *n, pl* **Negroes** [Sp or Pg, fr. *negro* black, fr. L *nigr-*, *niger*] (1555) **1** : a member of the black race of mankind distinguished

BLACK'S LAW DICTIONARY

With Pronunciations

Fifth Edition



recognized in overseas trade, to a named person "or assigns". U.C.C. § 7–104(1).

Negotiable instruments. To be negotiable within the meaning of U.C.C. Article 3, an instrument must meet the requirements set out in Section 3–104: (1) it must be a writing signed by the maker or drawer; it must contain an (2) unconditional (3) promise (example: note) or order (example: check) (4) to pay a sum certain in money; (5) it must be payable on demand or at a definite time; (6) it must be payable to the bearer or to order (examples of instruments payable to order are (a) "Pay to the order of Daniel Dealer," and (b) "Pay Daniel Dealer or order"); and (7) it must not contain any other promise, order, obligation, or power given by the maker or drawer except as authorized by Article 3. See also **Commercial paper; Negotiation.**

Negotiable words. Words and phrases which impart the character of negotiability to bills, notes, checks, etc., in which they are inserted; for instance, a direction to pay to A. "or order" or "bearer". See **Negotiable instruments.**

Negotiate /nəgówshiyèyt/. To transact business; to bargain with another respecting a purchase and sale; to conduct communications or conferences with a view to reaching a settlement or agreement. It is that which passes between parties or their agents in the course of or incident to the making of a contract and is also conversation in arranging terms of contract.

To communicate or confer with another so as to arrive at the settlement of some matter. To meet with another so as to arrive through discussion at some kind of agreement or compromise about something. Al Herd, Inc. v. Isaac, 271 Cal.App.2d 749, 76 Cal.Rptr. 697, 699. To discuss or arrange a sale of bargain; to arrange the preliminaries of a business transaction. Also to sell or discount negotiable paper, or assign or transfer it by indorsement and delivery. To conclude by bargain, treaty, or agreement. See also **Negotiation.**

Negotiated plea. The effect of plea bargaining in which the criminal defendant agrees to plead guilty to the charge or to a reduced charge in return for a recommendation from the prosecutor of a disposition less severe than possible under the particular statute. See **Plea bargaining.**

Negotiation /nəgòws(h)iyéyshən/. The transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery. U.C.C. § 3–202(1). The act by which a check or promissory note is put into circulation by being passed by one of the original parties to another person.

Negotiation is process of submission and consideration of offers until acceptable offer is made and accepted. Gainey v. Brotherhood of Ry. and S. S. Clerks, Freight Handlers, Exp. & Station Emp., D.C. Pa., 275 F.Supp. 292, 300. The deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction.

See also **Negotiate.**

Negotiorum gestio /nəgòwshiyórəm jés(h)ch(iy)ów/. Lat. In the civil law, literally, a doing of business or businesses. A species of spontaneous agency, or an interference by one in the affairs of another, in his absence, from benevolence or friendship, and without authority.

Negotiorum gestor /nəgòwshiyórəm jéstòr/. Lat. In the civil law, a transactor or manager of business; a person voluntarily constituting himself agent for another; one who, without any mandate or authority, assumes to take charge of an affair or concern for another person, in the latter's absence, but for his interest.

One who spontaneously, and without the knowledge or consent of the owner, intermeddles with his property, as to do work on it, or to carry it to another place, etc.

N.E.I. An abbreviation for *"non est inventus,"* he is not found.

Neife, naif, nativus /níyf/nayíyf/nətáyvəs/. In old English law, a woman who was born a villein, or a bond-woman.

Neighbor. One who lives in close proximity to another.

Neighborhood. A place near; an adjoining or surrounding district; a more immediate vicinity; vicinage. Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 129, 70 L.Ed. 322.

It is not synonymous with territory or district, but is a collective noun, with the suggestion of proximity, and refers to the units which make up its whole, as well as to the region which comprehends those units. A district or locality, especially when considered with relation to its inhabitants or their interests. In ordinary and common usage "locality" is synonymous in meaning with "neighborhood," and neither connote large geographical areas with widely diverse interests. Lukens Steel Co. v. Perkins, 70 App.D.C. 354, 107 F.2d 627, 631.

As used with reference to a person's reputation, "neighborhood" means in general any community or society where person is well known and has established a reputation.

Ne injuste vexes /níy ənjəstiy véksiyz/. Lat. In old English practice, a prohibitory writ, commanding a lord not to demand from the tenant more services than were justly due by the tenure under which his ancestors held.

Neither party. An abbreviated form of docket entry, meaning that, by agreement, neither of the parties will further appear in court in that suit used as a form of judgment in some states where a case has been settled.

Ne luminibus officiatur /níy l(y)uwmínəbəs əfishiyéydər/. Lat. In the civil law, the name of a servitude which restrains the owner of a house from making such erections as obstruct the light of the adjoining house.

Nemine contradicente /néməniy kòntrədəséntiy/. Lat. No one dissenting; no one voting in the negative. A phrase used to indicate the unanimous consent of a court or legislative body to a judgment, resolution, vote, or motion. Commonly abbreviated *"nem. con."*

Neminem lædit kwày júriy s(
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Neminem oport
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Nemo /níymow
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Nemo admitten
ædməténdəs è
be admitted t

Nemo agit in se
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and a party i

Nemo alienæ r
intelligitur /ı
dèyshiyówniy
No man is co
er's property
law, applied

Nemo alieno
æliyíynow n
can sue in th

Nemo aliquam
totum iteru
æləkwəm pár
tówdəm ídər
derstand any
the whole ag

Nemo allegan
/níymow æ
òdiyéndəs és
to be heard
evidence, bu
right founde

Nemo bis pu
pyúwnədər p
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Nemo cogitat
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ment on acc

Nemo cogitur
/níymow
íysh(iy)əm j
pelled to sel

Nemo contra
kóntrə fækt
can contra
principle of

Nemo damnur
habet /níym
kwòd fæsəri
as doing da
no right to

Nemo dare
pówdəst kw
which he h

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Editor in Chief

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merely, so as to vest in the indorsee the legal title, and thus enable him to bring a suit thereon in his own name. But in a strictly commercial classification, and as the term is technically used, it applies only to those instruments which, like bills of exchange, not only carry the legal title with them by indorsement, or delivery, but carry as well, when transferred before maturity, the right of the transferee to demand the full amounts which their faces call for. 'Assignable' is the more appropriate term to describe bonds, and ordinary notes, or notes of hand as they are most commonly called; as 'negotiable' is the more fitting term to describe the peculiar instruments of commerce." 1 John W. Daniel, *A Treatise on the Law of Negotiable Instruments* § 2, at 3 (Thomas H. Calvert ed., 7th ed. 1933).

negotiable bill of lading. See BILL OF LADING.

negotiable bond. See BOND (2).

negotiable certificate of deposit. A security issued by a financial institution as a short-term source of funds, usu. with a fixed interest rate and maturity of one year or less.

negotiable document of title. See DOCUMENT OF TITLE.

negotiable instrument. A written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is payable to order or to bearer. UCC § 3–104(a). — Also termed *negotiable paper*; *negotiable note*. ● Among the various types of negotiable instruments are bills of exchange, promissory notes, bank checks, certificates of deposit, and other negotiable securities.

> "What are called 'negotiable instruments,' or 'paper to bearer,' such as bills of exchange, or promissory notes, do really pass from hand to hand, either by delivery or indorsement, giving to each successive recipient a right against the debtor, to which no notice to the debtor is essential, and which, if the paper is held bona fide and for value, is unaffected by flaws in the title of intermediate assignors." Thomas E. Holland, *The Elements of Jurisprudence* 315–16 (13th ed. 1924).

> "One must first understand that a negotiable instrument is a peculiar animal and that many animals calling for the payment of money and others loosely called 'commercial paper' are not negotiable instruments and not subject to the rules of Article 3." James J. White & Robert S. Summers, 2 *Uniform Commercial Code* § 16–1, at 70 (4th ed. 1995).

negotiable note. See NEGOTIABLE INSTRUMENT.

negotiable order of withdrawal. A negotiable instrument (such as a check) payable on demand and issued against funds deposited with a financial institution. — Abbr. NOW.

negotiable-order-of-withdrawal account. See *NOW account* under ACCOUNT.

negotiable paper. See NEGOTIABLE INSTRUMENT.

negotiable words. The terms and phrases that make a document a negotiable instrument. — Also termed *words of negotiability*. See NEGOTIABLE INSTRUMENT.

negotiate, *vb.* **1.** To communicate with another party for the purpose of reaching an understanding <they negotiated with their counterparts for weeks on end>. **2.** To bring about by discussion or bargaining <she negotiated a software license agreement>. **3.** To transfer (an instrument) by delivery or indorsement, whereby the transferee takes the instrument for value, in good faith, and without notice of conflicting title claims or defenses <Jones negotiated the check at the neighborhood bank>.

negotiated market. See MARKET.

negotiated offering. See OFFERING.

negotiated plea. See PLEA (1).

negotiating bank. A financial institution that discounts or purchases drafts drawn under a letter of credit issued by another bank.

negotiation, *n.* **1.** A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. ● Negotiation usu. involves complete autonomy for the parties involved, without the intervention of third parties.

> "Negotiation, we may say, ought strictly to be viewed simply as a means to an end; it is the road the parties must travel to arrive at their goal of mutually satisfactory settlement. But like other means, negotiation is easily converted into an end in itself; it readily becomes a game played for its own sake and a game played with so little reserve by those taken up with it that they will sacrifice their own ultimate interests in order to win it." Lon L. Fuller, *Anatomy of the Law* 128 (1968).

2. (*usu. pl.*) Dealings conducted between two or more parties for the purpose of reaching an understanding. **3.** The transfer of an instrument by delivery or indorsement whereby the transferee takes it for value, in good faith, and without notice of conflicting title claims or defenses. — **negotiate,** *vb.* — **negotiable,**